No. 20418

United States

COURT OF APPEALS

for the Ninth Circuit

FEB 10 1967

CONTINENTAL CASUALTY COMPANY,
a corporation,

Appellant,

v.

JUSTIN N. REINHARDT, SEYMOUR L. COBLENS,
NORMAN A. STOLL and MORTON A. WINKEL,

Appellees.

APPELLEES' ANSWERING BRIEF

Appeal from the United States District Court for the District of Oregon

HON. JOHN F. KILKENNY, Judge

FILED

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STATEMENT OF JURISDICTION

Appellant, Continental Casualty Company, an Illinois corporation, with its principal place of business in Chicago, filed a complaint for declaratory relief against Justin N. Reinhardt, Seymour L. Coblens, Norman A. Stoll, and Morton A. Winkel, attorneys at law practicing in Port-

land, Oregon. The jurisdiction of the District Court was based upon the provisionsof 28 U.S.C. § 2201, the Federal Declaratory Judgment Act. The amount in controversy is in excess of $10,000, exclusive of costs and interest, and there is diversity of citizenship between the parties.

Appellant has filed timely notice of appeal (R. 28) from a judgment adverse to it. The jurisdiction of this court is conferred by 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellees adopt the statement of facts as generally set forth in Appellant's Opening Brief with the following additions.

As indicated, appellees' client, Mansfield & Company, held a default judgment against the Metropolitan Materials Company, an Oregon corporation in which Leslie E. Fordham was an officer, director, shareholder and accountant. In the course of supplementary proceedings, one of the appellees learned that certain corporate assets of Metropolitan Materials had been transferred to a partnership consisting of Fordham and Alan B. Kalkhoven, the president of Metropolitan, and that the financial statements of the corporation did not accurately reflect the amount of the shareholders' equity.

Appellee Winkel informed Metropolitan's attorney that if the matter was not settled an action would be filed against Fordham and Kalkhoven personally, and that if the action was filed a copy of the complaint would be forwarded to the Oregon State Board of Ac-

countancy. The action was filed, a copy of the complaint was sent to the State Board, and thereafter the case was tried. The trial judge (Crawford, J.), by written opinion in the state circuit court action, found in favor of Fordham and Kalkhoven. Although the Metropolitan assets were transferred to Fordham and Kalkhoven, and on its face this conduct appeared "unusual and somewhat irregular," the transaction was held to have been made in good faith, the situation being one in which "reason and integrity" were assumed on an analysis of corporate problems.

Shortly thereafter, Fordham filed an action for trade libel against appellees in the state circuit court. At all times previously referred to, appellees were insured (R. Tr. 3:19-20) under appellant's "Lawyer's Professional Liability Policy" (Pl. Ex. 101). The original complaint was duly tendered to the Continental Casualty Company and appellant declined the defense of the action in a letter dated August 25, 1964. As noted in appellant's statement of the case, motions to strike (Pl. Ex. 102-a) were allowed against portions of the Fordham complaint. That portion of paragraph XIV (Pl. Ex. 102) alleging that appellees' action was "taken strictly as what is commonly termed 'blackmail' " was ordered stricken. No amended complaint has as yet been filed in the state court action. The declaratory judgment action was then filed in the District court. It was there determined that appellant, under the terms of the policy, was bound to defend the action brought by Fordham against appellees (R. 19-22). Appellant has appealed from that judgment.

dicate potential liabilty which would be covered by the policy—an act which purportedly took place while appellees were performing professional services for a client. Does a lawyer perform professional services for a client other than in his capacity as a lawyer?

II. Where the complaint against an insured is ambiguous with respect to a fact determinative of coverage, the insurer is obligated to defend if there is potentially a case under the complaint within the coverage of the policy.

Blohm v. Glens Falls Insurance Co., ,231 Or. 410, 373 P.2d 412 (1962).
Lee v. Aetna Casualty & Surety Company, 178 F.2d 750 (2d. Cir., 1949).
Maryland Casualty Co. v. Pearson, 194 F.2d 284, 287 (2nd Cir., 1952).
Pow-Well Plumbing & Heating Inc. v. Merchants Mutual Casualty Co., 195 Misc. 251, 89 N.Y. S.2d 469, 474-475 (1949).
Ross v. Maryland Casualty Co., 11 AD2d 1002, 205 N.Y.S.2d 951 (1960).
Jacoby v. United States Fidelity & Guaranty Co., 27 Misc. 2d 396, 199 N.Y.S.2d 537, 539-540 (1960).

If one party prepares a contract which is accepted by the other, any ambiguities will be resolved against the party preparing the contract. This doctrine has had great vitality in the construction of insurance policies as prepared by the companies. The purpose of insurance is the protection of the insured against contingencies he does not foresee and the courts have almost universally held that if there is an ambiguity as to coverage and the

limits thereof, such ambiguities will be resolved against the insurance company.

(A) Trade libel need not necessarily involve actual malice and appellant's duty to defend is not relieved by exclusion (a) of the policy.

Appellant contends that appellees' conduct was malicious and thus excluded from coverage under exclusion (a). The complaint filed against the insureds admittedly alleges malice (which, of course, must be set forth if Fordham is to recover the punitive damages prayed for). Appellant apparently bases this contention on the proposition that "malice" is an unambiguous term under the law of Oregon.

Appellees, however, respectfully submit that the term "malice" is an ambiguous one under the particular circumstances involved in the case at bar. The complaint filed against appellees in the state court is a cause of action in trade libel and in defamation cases the concept of malice is distinguishable from that utilized in other areas of the law. Libel need not be a malicious act in the sense the term is used in the "common parlance" referred to in Appellant's Brief (p. 11).

In the class of cases dealing with defamation it has come to be recognized that two distinct kinds of malice may exist—implied malice and actual malice. Since implied malice is nothing more than a legal fiction, a libel action need not necessarily be one involving malice. Therefore, exclusion (a) would not apply at all. At best, the term is ambiguous since actual malice need not be shown in order for Fordham to recover any damages

other than punitive. Even though the allegations of the state court complaint are based in part on excluded grounds, the insurer must still defend if the state court plaintiff could recover on such complaint on non-excluded grounds. (*Blohm* v. *Glen Falls, supra; Runyan, et al* v. *Continental Casualty Company,* 233 F. Supp. 214 (Or., 1964).

In support of its position, appellant has cited two Oregon decisions, neither of which is a defamation action. In the first case, *Jaco* v. *Baker,* 174 Or. 191, 148 P.2d 938 (1944), the plaintiff brought an action to recover for injuries received from the bites of a vicious dog. The second case, *Cook* v. *Kinzua Pine Mills,* 207 Or. 34, 293 P.2d 717 (1955), involved a collision between a truck and an automobile. Appellant relies on the general definition of malice set forth in these decisions as controlling in the case at bar. With this generalization we cannot agree.

As early as 1896, the Oregon court recognized the existence of two types of malice. In *Thomas* v. *Bowen,* 29 Or. 258, 45 Pac. 768 (1896), it was held that if a publication is libelous per se, malice is presumed. This state has continued to recognize the dichotomy. In *State* v. *Kerekes,* 225 Or. 352, 357 P.2d 413, 358 P2d 523 (1960), the defendant was accused of criminal libel. The court therein found that "malice," in libel cases, has acquired a double meaning and requires further refinement.

> "In cases which do not invoke privileged communications, 'malice' is said to be presumed from the false publication. This kind of presumed malice may or may not co-exist with actual malice." At p. 362.

Further examination of the early *Bowen* decision, supra, indicates that malice may even be an unnecessary allegation since where the law "presumes a fact it need not be stated in the pleading." Other jurisdictions have decided that malice is not a necessary element of civil libel for recovery of compensatory damages (e.g., see *Purvis* v. *Bremer's, Inc.*, 54 Wash. 2d 743, 344 P.2d 705 (1959)).

Harper & James comments on the question of malice in this way:

> "Perhaps no word in the law is used more loosely . . . It has been associated with the language of pleadings and opinions in cases of defamation for centuries, but it has been used with a double meaning. In the first place, although in complaints and declarations in libel and slander it is alleged that the defamatory statement was made 'maliciously,' the element of malice in the sense of bad or evil intention is not at all necessary to make the publication actionable. In fact, malice really has nothing to do with the case. . . . The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. . . . In the second place, malice, in the real sense, 'known in fact or experience,' is important in connection with the defense of qualified or conditional privilege. . . . The kind of malice necessary to defeat the protection of privilege has nothing to do with the 'malice' that is said to be 'presumed' from the publication of false and defamatory statements." (Harper & James, Law of Torts, v. I, § 5.27, p. 450 (1956); also, see Prosser on Torts, ch. 21, § 108, p. 790-91 (3rd ed., 1964)).

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER H. EVANS, JR.
Attorney for Appellees